

FORM FOR USE IN APPLICATIONS

FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254

RECEIVED

CHRISTOPHER McCULLOUGH

Name

2007 JAN -8 A 9:40

174909

Prison Number

DEBRA P. HACKETT, CLERK
U.S. DISTRICT COURT
MIDDLE DISTRICT ALA

W.E. DONALDSON 100 WARRIOR CAVE

BESSEMER, ALABAMA 35023

Place of Confinement

United States District Court MIDDLE District of ALABAMACase No. 3:07-CV-71-WHA

(To be supplied by Clerk of U. S. District Court)

CHRISTOPHER McCULLOUGH

, PETITIONER
(Full Name) (Include name under which you were convicted)

DANIEL JONES - WARDEN

, RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized person
having custody of Petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF ALABAMA

, ADDITIONAL RESPONDENT.

(if petitioner is attacking a judgement which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. §2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN
STATE CUSTODY

INSTRUCTIONS--READ CAREFULLY

- (1) This petition must be legibly handwritten or typewritten and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

The Judicial Conference of the United States has adopted, effective 1/1/83, the 8½ x 11 inch paper size standard for use throughout the federal judiciary and directed the elimination of the use of legal size paper. All pleadings, etc. filed after 12/31/82 must be on 8½ x 11 inch paper, otherwise we cannot accept them.

- (2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) Upon receipt of a fee of \$5 your petition will be filed if it is in proper order.
- (4) If you do not have the necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.
- (6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.
- (7) When the petition is fully completed, the original and two copies * must be mailed to the Clerk of the United States District Court whose address is:

P.O. Box 711
Montgomery, Alabama 36101

- (8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

***If you are proceeding in forma pauperis, only the original petition needs to be filed with the Court.**

PETITION

1. Name and location of court which entered the judgment of conviction under attack CHAMBERS COUNTY LAFAYETTE ALABAMA 36862
2. Date of judgment of conviction NOVEMBER 14, 2003
3. Length of sentence 40 YEARS Sentencing Judge RAY MARTIN

4. Nature of offense or offenses for which you were convicted: ATTEMPTED
BURGLARY 1ST DEGREE

5. What was your plea? (check one)

- (a) Not guilty ☒
 (b) Guilty ☐
 (c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

6. Kind of trial: (Check one)

- (a) Jury ☒
 (b) Judge only ☐

7. Did you testify at the trial? Yes ☒ No ☐

8. Did you appeal from the judgment of conviction? Yes ☒ No ☐

9. If you did appeal, answer the following:

- (a) Name of court COURT OF CRIMINAL APPEALS
 (b) Result AFFIRMED
 (c) Date of result _____

If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes ☒ No ☐

11. If your answer to 10 was "yes", give the following information:

- (a) (1) Name of court CHAMBERS County CIRCUIT COURT
 (2) Nature of proceeding POST-CONVICTION RULE 32

(3) Grounds raised PRODUCTION OF FALSE EVIDENCE, VERDICT CONTRARY TO LAW, INEFFECTIVE ASSISTANCE OF COUNSEL, CONVICTION OBTAINED BY A VIOLATION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ☐ No ☒

(5) Result DENIED

(6) Date of result SEPTEMBER 26, 2005

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No ()

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of Court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No ()

(5) Result _____

(6) Date of result _____

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc.

Yes ()

No ()

(2) Second petition, etc.

Yes ()

No ()

(3) Third petition, etc.

Yes ()

No ()

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

I DID NOT RECEIVE ANY NOTIFICATION THAT THIS PETITION WAS DISMISSED OR DENIED UNTIL DECEMBER, 2006 ON WHICH I HAD TO WRITE THE CIRCUIT CLERK CHARLES W. STORY FOR THIS INFORMATION

- (e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____
- _____
- _____
- _____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

- A. Ground one: (C) CONVICTION OBTAINED BY USE OF EVIDENCE GAINED PURSUANT TO AN UNCONSTITUTIONAL SEARCH & SEIZURE

Supporting FACTS (tell your story briefly without citing cases or law):

ON MARCH 19, 2002 MY VEHICLE WAS STOPPED BY A LANETT POLICE OFFICER ROBBIE BETTES ON WHICH IT WAS A 1985 MUSTANG. I WAS TOLD BY OFFICER BETTES THAT THE REASON THAT HE STOPPED ME WAS BECAUSE THE CO-DEFENDANT WAS SEEN LOOKING THROUGH A WINDOW IN POSSESSION OF A FIRE ARM. IN MY ARM REST LAYED A SKI-MASK ON WHICH I PLACED IN MY BACK POCKET TO SHOW THE OFFICER THAT I HAD NOTHING TO HIDE. AFTERWARDS SEVERAL LANETT POLICES SEARCHED MY VEHICLE SEVERAL TIMES WITHOUT OBTAINING A SEARCH WARRANT TO DO SO. AT JURY TRIAL ALL 3 WITNESS ACKNOWLEDGE THAT THEY NEVER SAID ANYTHING ABOUT A GUN ON THIS DAY.

- B. Ground two: (E) CONVICTION OBTAINED BY A VIOLATION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

Supporting FACTS (tell your story briefly without citing cases or law):

I TESTIFIED AT THIS TRIAL TO THE TRUTH OF THIS INCIDENT ON WHICH I STATED THAT THE CO-DEFENDANT WANTED TO DO SOMETHING ILLEGAL TO JOIN A GANG. I WAS THERE TO EYE WITNESS THE EVENT NOT TO PARTICIPATE. SO, I TESTIFIED THAT I HAD THE SKI-MASK ONLY TO REVEAL MY IDENTITY TO KEEP FROM BEING SEEN. AFTER THE CO-DEFENDANT BILLY MORRIS TOLD ME THAT HE SAW SOMEONE IN THE HOUSE I STOPPED HIM FROM DOING ANYTHING. THE BRIEFS ENCLOSED WILL EXPLAIN EVERYTHING.

- C. Ground three: (F) CONVICTION OBTAINED BY THE UNCONSTITUTIONAL FAILURE OF THE PROSECUTION TO DISCLOSE FAVORABLE EVIDENCE TO THE DEFENDANT

Supporting FACTS (tell your story briefly without citing cases or law):

THE DISTRICT ATTORNEY BILLY SENBY DID ADMIT FALSE EVIDENCE TO WET A BLUE SKI MASK ON WHICH HE PRODUCED AT THIS JURY TRIAL TO STRENGTHEN THE PROSECUTION CASE AGAINST ME. THIS DISTRICT ATTORNEY OFFICE POSSESS A VIDEO TAPE TO WHICH DISPLAYS THAT THE LANETT POLICE OFFICERS DID LET ME WALK AWAY WITH THIS SKI-MASK ON WHICH I DISPOSED OF ONCE I GOT TO THE LANETT POLICE DEPARTMENT. THEY DID NOT DISCLOSE AT THIS TRIAL OF THE FAVORABLE EVIDENCE TO THE DEFENDANT OF NO D.V.A. SALES OF HAZZ FROM THE SKI-MASK AND NO FINGER PRINTS ON EITHER OF THESE GUNS. AND THE CO-DEFENDANT WITHDRAWED GUILTY PLEA.

D. Ground four: ② DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL

Supporting FACTS (tell your story briefly without citing cases or law):

ATTORNEY KYLA GROSS KELLY STATED IN EFFECTIVENESS AT THIS JURY TRIAL BECAUSE I REQUESTED THAT THE JURY SEE THE VIDEOTAPE OF THE STOPPING OF MY MUSTANG IN WHICH WOULD HAVE DISCLOSED THAT I INDEED WALKED OFF WITH THE SKI-MASK IN MY BACK POCKET AND WAS PLACED IN SIDE OF A LAVETT POLICE DEPARTMENT PATROL CAR ON WHICH I TOOK THE SKI-MASK OUT OF MY BACK POCKET AND PLACED DOWN MY PANTS LEG UNTIL I GOT TO THE LAVETT POLICE DEPARTMENT THEN DISPOSED OF IT. SHE SAID THAT SHE DIDNT WANT THE JURY TO SEE THE GUNS IN THE CAR BUT WANTED ME TO STIPULATE THAT THEY FOUND THEM IN MY CAR. SHE ALLOWED THIS FALSE EVIDENCE TO HAVE WEIGHT.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal state briefly what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court, wither state or federal, as to the judgment under attack? Yes () No ()

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

- (a) At preliminary hearing STEVE MORRIS UPSTAIRS COLDWELL BUILDING WEDOWEE, ALABAMA 36278 596 1ST AVENUE SE
 (b) At arraignment and plea 11 P.O. BOX 814
 (c) At trial 11
 (d) At sentencing 11
 (e) On appeal RONALD SLEDGE VALLEY, ALABAMA 36854

(f) In any post-conviction proceeding CHRISTOPHER McCULLOUGH PROSE

(g) On appeal from any adverse ruling in a post-conviction proceeding: _____

N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes () No (☒)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes (☒) No ()

(a) If so, give name and location of court which imposed sentence to be served in the future: CHAMBERS COUNTY CIRCUIT COURT

20 YEARS, 25 YEARS

(b) And give date and length of sentence to be served in the future: _____

20 years, 25 years

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes (☒) No ()

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on DECEMBER 2, 2006.
(date)

Christopher C. McCullough
Signature of Petitioner

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE MIDDLE DISTRICT
STATE OF ALABAMA

RECEIVED

CHRISTOPHER McCULLOUGH, #174909 * CR. NO. 03-1103

2007 JAN -8 A 9:41
DEBRA P. HACKETT, CLK
U.S. DISTRICT COURT
MIDDLE DISTRICT ALA

PETITIONER, *

* TRIAL COURT

VS.

STATE OF ALABAMA,

* CASE NO: CC-2009-318

RESPONDENT, *

* 3:07CV26-mef

INITIAL BRIEF OF PETITIONER

ORAL ARGUMENT REQUESTED

CHRISTOPHER McCULLOUGH
W.E. DONALDSON #174909
100 WARRIORLANE
BESSEMER, ALABAMA 35023

PRO'SE

STATEMENT REGARDING ORAL ARGUMENT

ORAL ARGUMENT IS RESPECTFULLY REQUESTED.
THE FACTUAL AND LEGAL ARGUMENTS
PRESENTED IN THE BRIEFS AND RECORDS
AND THE DECISIONAL PROCESS WOULD
BE SIGNIFICANTLY AIDED BY ORAL
ARGUMENT

i.

TABLE OF CONTENTS

PAGE NO'S

STATEMENT REGARDING ORAL ARGUMENT...	I.
TABLE OF CONTENTS.....	II.
TABLE OF AUTHORITIES.....	III. IV
STATEMENT OF THE CASE.....	PAGE 1.
STATEMENT OF ISSUES PRESENTED,...	PAGE 2.
FOR REVIEW	
STATEMENT OF FACTS.....	PAGE 3.
SUMMARY OF ARGUMENT.....	PAGE 4.
ARGUMENT.....	PAGES 5-21.
I. VERDICT WAS CONTRARY TO THE LAW... AND THE WEIGHT OF THE EVIDENCE	PAGES 5-8.
II. ADMISSION OF FALSE EVIDENCE....	PAGE 8.
III. TRIAL JUDGE GAVE IMPROPER JURY CHARGE, REFUSE TO ANSWER JURY'S QUESTIONS, REFUSED TO GIVE REQUESTED JURY CHARGE, AND VIOLATED HIS DISCRETION AT HIS SENTENCE HEARING.	PAGES 11.
IV. ILLEGAL SEARCH AND SEIZURE OF VEHICLE	PAGES 11-13.
V. CONFLICTED TESTIMONY OF STATE WITNESS'S	PAGES 5-7.
VI. PRIVILEGE AGAINST SELF INCRIMINATION	PAGES 13-16.
VII. INEFFECTIVE ASSISTANCE OF COUNSEL	PAGES 17-19.
VIII. THE VALUE OF A WAIVER OF RIGHTS. FORM	PAGES 20-21.
CONCLUSION.....	PAGE 22.
CERTIFICATE OF SERVICE.....	PAGE 23.
PAGE II.	

TABLE OF AUTHORITIES

AUTHORITY:PAGE NO'S:

CASES:

GRAYSON V. STATE 675 So. 2D 516 (ALA. CRIM. APP. 1995)	PAGE 17.
BEDWELL V. STATE 710 So. 2D 493 (ALA. CRIM. APP. 1997)	PAGE 12.
JONES V. STATE 555 So. 2D 333 (ALA. CRIM. APP. 1989)	PAGE 10.
MOBLEY V. STATE 563 So. 2D 29 (ALA. CRIM. APP. 1990)	PAGE 7.
MATKINS V. STATE 497 So. 2D 194 (ALA. CRIM. APP. 1985)	PAGE 16.
^{AFFIRMED} DILL V. STATE 717 So. 2D 6 (ALA. CRIM. APP. 1994)	PAGE 16.
GIBSON V. STATE 555 So. 2D 784 (ALA. CRIM. APP. 1989)	PAGE 21.
DEUTSCH V. STATE 610 So. 2D 1212 (ALA. CRIM. APP. 1992)	PAGE 10.
WOODS V. STATE 485 So. 2D 1243 (ALA. CRIM. APP. 1986)	PAGE 9.
EX PARTE G.G. 601 So. 2D 890 (ALA 1992)	PAGE 14.
PRANTZ V. STATE 462 So. 2D 781 (ALA. CRIM. APP. 1984)	PAGE 14.
JONES V. STATE 481 So. 2D 1183	PAGE 15.
(ALA. CRIM. APP. 1985)	

TABLE OF AUTHORITIES (CONTINUED)

AUTHORITY:PAGE NO'S:

CASES:

HUGGINS V. STATE 41 ALA. APP. 548 142 SO. 2D 915 (CERT. DENIED)	PAGE 15.
HOLLINS V. STATE 415 SO. 2D 1249 (ALA. CRIM. APP. 1982)	PAGE 15.
MANIGONE V. STATE 740 SO. 2D 444	PAGE 6.
RUTZEN V. STATE 513 SO. 2D 63 (ALA. CRIM. APP. 1987)	PAGE 16.
BROADHEAD V. STATE 24 ALA. APP. 576 139 SO. 115 (1932)	PAGE 15.
HOOKS V. STATE 534 SO. 2D 329 (ALA. CRIM. APP. 1987)	PAGE 10.
GUTHRIE V. STATE 616 SO. 2D 914	PAGE 19.
EX PARTE HARDLEY 766 SO. 2D 154 1999 ALA. LEXIS 337 (ALA 1999)	PAGES.

STATUTES AND OTHER AUTHORITIES:

ALA. CODE § 13A-4-2	PAGE 14, 16
ALA. CODE § 13-A-5-47	PAGE 10.
ALA. RULES OF COURT 26.9 (2002)	PAGE 10.

ADDED AUTHORITY:

CASES:

EX PARTE BESSELAAR V. STATE 600 SO. 2D 978, 979 (ALA 1982) PAGE 19.	19.
BENEFIELD V. STATE PAGE 19.	19.
583 SO. 2D 1370 (ALA CRIM. APP. 1990).	
SHERMAN V. STATE PAGE 12.	
291 ALA 484, 282 SO. 2D 700	
WEAVER V. STATE 710 SO. 2D 480 PAGE 20.	

IV

ZVEY V. STATE
709 SO. 2D 502 (ALA. CRIM. APP. 1992.)
PAGE 12.

TOMLIN V. STATE
591 SO. 2D 550
(ALA. CRIM. APP. 1991). PAGE 18.

MICHES CRIMINAL CODE
ANNOTATED (2003) PAGE 29

BEASLEY LYCES JR. V. STATE 709 SO. 2D 1335
(ALA. CRIM. APP. 1992.) PAGE 12.

STATEMENT OF THE CASE

ON OR ABOUT AUGUSTS, 2002 I WAS INDICTED BY THE CHAMBERS COUNTY GRAND JURY FOR THE CHARGE OF ATTEMPTED BURGLARY 1ST DEGREE WITH A WEAPON IN MY POSSESSION.

I WENT TO JURY TRIAL ON NOVEMBER 13TH AND 14TH OF 2003 AND WAS FOUND GUILTY AS THE INDICTMENT CHARGED AND SENTENCED TO FORTY YEARS IMPRISONMENT.

AT SENTENCING JUDGE RAY MARTEN DID VIOLATE HIS JUDICIAL DISCRETION.

AT THIS JURY TRIAL ON NOVEMBER 13TH AND 14TH OF 2003 HE VIOLATED HIS JUDICIAL DISCRETION BY GIVING IMPROPER JURY CHARGE TO THE JURY AND REFUSED TO GIVE THE REQUESTED JURY CHARGES.

JUDGE RAY MARTEN DID VIOLATE HIS JUDICIAL DISCRETION BY REFUSING TO RESPOND TO THE JURY'S 2 QUESTIONS WHEN THEY SHOWED DIFFICULTY ON DECIDING THE EVIDENCE. DISTRICT ATTORNEY BELLISENBY DID ADMIT FALSE EVIDENCE AT THE JURY TRIAL TO WIT: A BLUE SKI MASK.

CASE WAS AFFIRMED BY THE COURT OF CRIMINAL APPEALS. CERT. DENIED TO ALABAMA SUPREME COURT. THEN I FILED POST-CONVICTED ON RULE 32 TO CHAMBERS COUNTY CIRCUT ON MARCH 29, 04 ON WHICH IT WAS DENIED ON SEPTEMBER 26, 2005 ON WHICH IN THE 18 MONTH TIME SPAN THE JUDGE DID NOT GIVE ME A QUOTIDIANARY HEARING AS I REQUESTED.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. VERDICT WAS CONTRARY TO THE LAW AND THE WEIGHT OF THE EVIDENCE.
- II. ADMISSION OF FALSE EVIDENCE.
- III. TRIAL JUDGE GAVE IMPROPER JURY CHARGE, REFUSED TO ANSWER JURY'S QUESTIONS, REFUSED TO GIVE REQUESTED JURY CHARGE, AND VIOLATED HIS DISCRETION AT MY SENTENCE HEARING.
- IV. ILLEGAL SEARCH AND SEIZURE OF VEHICLE.
- V. CONFLICTED TESTIMONY OF STATE WITNESSES.
- VI. PRIVILEGE AGAINST SELF-INCRIMINATION.
- VII. INEFFECTIVE ASSISTANCE OF COUNSEL.
- VIII. THE VALUE OF A WAIVER OF RIGHTS FORM.

STATEMENT OF FACTS

I WAS CONVICTED OF ATTEMPTED BURGLARY 1ST DEGREE ON NOVEMBER 13TH AND 14TH 2003. PRIOR TO THE JURYS VERDICT BEING CONTRARY TO LAW AND TO THE WEIGHT OF THE EVIDENCE AN DIRECT APPEAL FOLLOWED ON WHICH WAS AFFIRMED BY THE COURT OF CRIMINAL APPEALS AND CERTIORARI WAS DENIED BY ALABAMA SUPREME COURT. POST-CONVICTION RULE 3A WAS FILED AND I PROCEEDED AS PRO SE ON MARCH 19, 2004 AND IT WAS DISMISSED ON SEPTEMBER 25, 2005 WITHOUT EVIDENTIARY HEARING. SEVERAL ISSUES WAS RAISED ON THIS POST-CONVICTION PETITION WHICH WAS WARRANTED FOR EVIDENTIARY HEARING. I DID NOT RECEIVE NOTIFICATION OF DISMISAL UNTIL DECEMBER 2006 AFTER I WROTE THE CIRCUIT CLERK FOR UPDATE STATUS.

SUMMARY OF ARGUMENT

THE JURY'S VERDICT WAS CONTRARY TO LAW AND THE EVIDENCE.

STATE DID NOT PROVE THAT Z WAS IN POSSESSION OF A WEAPON WHEN THIS ALLEGED CRIME TOOK PLACE.

TRIAL JUDGE VIOLATED HIS DISCRETION TWICE DURING THE PHASE OF THIS JURY TRIAL. DISTRICT ATTORNEY SUBMITTED OR ADMITTED FALSE EVIDENCE, CONFLICTED TESTIMONY BY WITNESSES FOR THE STATE. PRECLUDED AGAINST SELF-INCRIMINATION IN EFFECTIVE ASSISTANT OF COUNSEL AND THE VALUE OF AN WAIVER OF RIGHTS FORM.

ARGUMENT

STANDARD OF REVIEW

CORROBORATION WAS INSUFFICIENT WHERE, BUT FOR ACCOMPLICES TESTIMONY AND THE DEPUTY'S HEARSAY REFERENCES TO THE OTHER ACCOMPLICES STATEMENTS, THERE WAS NO EVIDENCE TENDING TO CONNECT DEFENDANT WITH THE COMMISSION OF THE CRIME; THE EVIDENCE UPON WHICH DEFENDANT WAS CONVICTED EMANATED MERELY FROM THE BARE STATEMENTS OF THE ACCOMPLICES.

EX PARTE HARDEY, 766 S.D. 2015 (1999),

ALA. LEXIS 337 (ALA. 1999).

I. VERDICT WAS CONTRARY TO LAW AND THE WEIGHT OF THE EVIDENCE.

THIS COURT WILL REVIEW THE ISSUE OF WHETHER THE JURY'S VERDICT WAS CONTRARY TO LAW IF DEFENDANT CAN DISCLOSE THAT THE WEIGHT OF THE EVIDENCE WAS IN HIS FAVOR. DEFENDANT CONTENDS THAT AT THIS JURY TRIAL ON NOVEMBER 13TH AND 14TH OF 2003 THAT THERE WAS COMPLETE CONFLICT REGARDING THE WITNESS TESTIMONY FOR THE STATE, AND ONE OF THE STATEMENTS THE STATE WITNESS MADE ON THE DAY OF THE INCIDENT. AT THIS JURY TRIAL MRS. PEARL TRAMMELL THE HIREO HELP TESTIFIED AT THIS TRIAL RIGHT BEFORE MRS. JUDITH GRAGGS DID. MRS. PEARL TRAMMELL'S STATEMENT SAID THAT SHE WAS POSITIONED IN THE BACK OF THE HOUSE WHERE SHE WAS FOLDING SOME CLOTHES ON WHICH SHE SAW A VERY TALL BLACK MALE WITH A BANDANNA AROUND HIS FACE LOOKING INTO A WINDOW.

AND SHE ALSO STATES AFTER SHE SAW THIS ONE MAN SHE NOTIFIED THE GRAGGS IMMEDIATELY. AFTERWARDS SHE STATED THAT SHE AND JUDITH GRAGG WENT TO A BEDROOM ALSO LOCATED AT THE BACK OF THE HOUSE AND SAW SOMEONE RUNNING IN THE GRAGGS BACKYARD. AT TRIAL MRS. TRAMMELL TESTIMONY GOES AS FOLLOWS: SHE PROCLAIMS THAT SHE WAS AT THE BACK OF THE HOUSE FOLDING CLOTHES WHEN SHE SAW A VERY TALL BLACKMAN LOOKING INSIDE A BACK WINDOW AND THAT SHE SAW ANOTHER MAN WITH A SKI-MASK AT THE FRONT OF THE HOUSE. THIS TESTIMONY ALONE IS CONTRADICTORY BECAUSE IF SHE WAS POSITIONED IN THE BACK OF THE HOUSE IT WAS SIMPLY IMPOSSIBLE FOR HER TO VIEW THE SIDE OR THE FRONT OF THIS VERY LARGE HOUSE. THEN SHE GOES ON TO SAY THAT SHE AND MRS. JUDITH GRAGG BOTH WENT INSIDE OF A BEDROOM TO LOOK OUT A WINDOW AND THEY BOTH SAW TWO MEN RUNNING TOWARD THE BARN IN THE BACKYARD. SHE TESTIFIED THAT THEY WERE STANDING SIDE BY SIDE WHEN THIS ACT OCCURRED. MRS. JUDITH GRAGG THEN CAME TO THE WITNESS STAND TO TESTIFY RIGHT AFTER MRS. PEARL TRAMMELL AND SPECIFICALLY STATED UNDER OATH THAT SHE WAS NOT GOING TO LIE AND TESTIFIED THAT WHY SHE AND MRS. TRAMMELL WERE LOOKING OUT THIS BEDROOM WINDOW SHE SAW ONE MAN RUN THROUGH HER BACKYARD AND DESCRIBED EXACTLY ON WHAT HE WAS WEARING ON THIS DAY. SHE SAID THAT THE MAN THAT SHE SAW WAS VERY TALL AND HAD ON A WHITE T-SHIRT AND BLUE JEANS WHICH SHE DESCRIBED ON WHAT BILLY NORRIS HAD ON THIS DAY TO THE EXACT COMPACTLY. SHE TESTIFIED THAT HE WAS THE ONLY PERSON THAT SHE SAW ON HER PROPERTY. MRS. TRAMMELL WAS ASKED BY DEFENSE ATTORNEY ON WHAT Z WAS WEARING SHE PROCLAIMED THAT SHE DID NOT REMEMBER.

MR. MIKE GRAGGS THEN TESTIFIED AND STATED THAT HE DID NOT SEE ANY ONE ON HIS PROPERTY AND THAT HE WENT SOLELY BY WHAT HIS WIFE HAD TOLD HIM. MORE CONTRADICTION IS THAT BOTH WOMEN TESTIFIED THAT THEY WERE LOOKING OUT THE SAME WINDOW AT THE SAME TIME BUT MRS. JUDITH GRAGG WHO IS THE OWNER OF THIS HOUSE SAYS THAT SHE SAW ONE MAN ON HER PROPERTY AND MRS. PEARL TRAMMELL WHO WAS THE HIRED HELP STATED THAT SHE SAW TWO MEN. I STAND TO CHALLENGE THAT AT THIS JURY TRIAL MRS. JUDITH GRAGG TESTIMONY SHOULD HAVE OUTWEIGHED MRS. PEARL TRAMMELL TESTIMONY WHICH WAS IN MY FAVOR. THIS ALONE SHOWS THAT THE JURY'S VERDICT WAS SUPPORTED BY INSUFFICIENT EVIDENCE.

THE JURY IS SUPPOSED TO COLLATE AND APPRAISE THE INDEPENDENT EVIDENCE AGAINST EACH DEFENDANT SOLELY UPON THE DEFENDANT'S OWN ACTS. *MOBLEY V. STATE*, 563 SO. 2D 9 (ALA. CRIM. APP. 1990). AND THE UNDISPUTED TESTIMONY OF ALL WITNESSES THAT STATES THAT ON MARCH 19, 2002 DAY OF THIS INCIDENT, THAT NO ONE SAW ANY GUN OR SAID ANYTHING ABOUT ANYONE HAVING A GUN. THIS TESTIMONY OF THREE OF THE STATE WITNESSES ON WHICH WERE THE PEOPLE WHO OCCUPIED THIS RESIDENCE ON THE DAY OF ALLEGED CRIME ELIMINATED ANY USE OF A WEAPON INVOLVED IN THIS ALLEGED CRIME. THE ALABAMA LAW IS WELL SETTLED THAT IF A DEFENDANT IS ACCUSED OF COMMITTING A CRIME WITH A WEAPON AND ALL THE EVIDENCE TEND TO SHOW THAT IT WAS DONE WITHOUT A WEAPON THERE IS A FATAL VARIANCE BECAUSE THE GUN CONSTITUTES THE SERIOUSNESS OF THE CHARGE, *MICHES CRIMINAL CODE ANNOTATED* (2003).

THERE FOR THE JURY MADE AN INCOMPETENT DECISION ON FINDING ME GUILTY AS THE INDICTMENT CHARGED SOLELY BASED ON INSUFFICIENT EVIDENCE. IF ALL THE EVIDENCE SHOWS THAT NO WEAPON WAS USED TO COMMIT THIS ALLEGED CRIME THEN THE JURY COULD NOT FIND ME GUILTY OF COMMITTING THIS OFFENSE WITH A WEAPON. THEREFORE THE STATUS OF THIS CRIME IS DEDUCTED FROM CLASS A TO CLASS C ON WHICH ATTEMPTED BURGLARY 3RD DEGREE IS KNOWN OR CONSIDERED AS CRIMINAL TRESPASS 1ST DEGREE WHICH IS AN CLASS A MISDEMEANOR. THEREFORE THE JURY WAS INCOMPETENT AND WAS WITHOUT JURISDICTION TO PASS SUCH VERDICT.

II. ADMISSION OF FALSE EVIDENCE

I THE DEFENDENT CONTEND THAT THE DISTRICT ATTORNEY BILL LISENBY DID WILLINGLY ADMIT FALSE EVIDENCE TO WIT A BLUE SKI MASK ON WHICH THE LANETT POLICE DEPARTMENT OFFICERS NEVER TOOK OF ME AT THIS STOP. THE VIDEO TAPE OF THIS STOP DISCLOSES THAT I WALKED AWAY WITH THIS SKI-MASK AND DISPOSED OF IT AT THE LANETT POLICE DEPARTMENT. THE ONLY THING ON WHICH MADE ME A PARTY TO THIS CRIME WAS THE SKI-MASK ON WHICH THEY NEVERED TOOK FROM ME. SO THE SKI-MASK THAT HE PRESENTED AT THIS JURY TRIAL WAS FALSE EVIDENCE. THIS VIDEO TAPE WILL DEFINITELY SHOW THIS

III. TRIAL JUDGE GAVE IMPROPER JURY CHARGE, REFUSED TO ANSWER JURYS QUESTIONS, REFUSED TO GIVE REQUESTED JURY CHARGE, AND VIOLATED HIS DISCRETION AT MY SENTENCING HEARING

I THE DEFENDANT DO HEREBY CONTEND THAT JUDGE RAY MARTIN GAVE ERRONEOUS INSTRUCTIONS TO THE JURY REGARDING THE OFFENSE OF ATTEMPTED BURGLARY 2ND DEGREE. I CONTEST THAT THIS JURY CHARGE WAS ERRONEOUS AND IMPROPER BECAUSE AFTER ALL THE EVIDENCE WAS PRESENTED BY THE STATE AND DEFENDANT IT SHOWED THAT NO WEAPON WAS INVOLVED IN THIS ALLEGED CRIME. SO BY NO WEAPON BEING USED TO COMMIT THIS ALLEGED CRIME IT CONSTITUTED AND WARRANTED FOR A LESSER INCLUDED OFFENSE. 14TH AMENDMENT STATES THAT NO STATE SHALL DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW. DUE PROCESS REQUIRES THAT A LESSER INCLUDED OFFENSE INSTRUCTION BE GIVEN ONLY WHEN THE EVIDENCE WARRANTS SUCH AN INSTRUCTION. WOODS V. STATE, 485 SO. 2D 1243 (ALA. CRIM. APP. 1986). AT THIS JURY TRIAL THE EVIDENCE DEFINITELY WARRANTED A LESSER INCLUDED OFFENSE OF ATTEMPTED BURGLARY 3RD DEGREE WHICH IS CONSIDERED AS AN ACT OF CRIMINAL TRESPASSING AND CLASS A MISDEMEANOR. JUDGE RAY MARTIN GAVE THE JURY CHARGE OF ATTEMPTED BURGLARY 2ND DEGREE WHICH IS NOT A LESSER INCLUDED OFFENSE OF ATTEMPTED BURGLARY 1ST DEGREE. (SEE MICHIGAN CRIMINAL CODE ANNOTATED 2003). ALSO THE JURY SHOW DIFFICULTY CONTEMPLATING OVER THE EVIDENCE ON WHICH THEY ASKED JUDGE RAY MARTIN FOR HIS HELP THEY POSED TO QUESTIONS TO HIM TO SPECIFY THEIR DIFFICULTIES. ① WAS THERE ANY FINGER PRINTS ON THE GUN. ② DID HE HAVE A CHANCE TO WRITE HIS OWN STATEMENT.

HIS RESPONSE WAS QUOTE-UNQUOTE (I AM NOT GOING TO ANSWER ANY OF YOUR QUESTIONS, YOU HEARD ALL OF THE EVIDENCE YOURSELVES YOU MUST DECIDE ON THE EVIDENCE THAT YOU HEARD.)

A TRIAL JUDGE HAS SOME OBLIGATION TO MAKE REASONABLE EFFORTS TO ANSWER A QUESTION FROM THE JURY.

WHEN A JURY EXPLICIT ITS DIFFICULTY AT TRIAL A TRIAL JUDGE SHOULD CLEAR THEM AWAY WITH CONCRETE ACCURACY.

DEUTSCH V. STATE, 60 SO. 2D 1212 (ALA. CRIM. APP. 1992).

ALSO AT SENTENCING HEARING JUDGE RAY MARTEN DID VIOLATE HIS DISCRETION BY VIOLATING THE RULES OF COURT RULE 26.9 (1) AFFORD THE DEFENDANT AN OPPORTUNITY TO MAKE A STATEMENT IN HIS OWN BEHALF BEFORE IMPOSING SENTENCE.

HE ALSO VIOLATED HIS DISCRETION ON THE GROUNDS OF THE JUDGE DID NOT ASK THE COURT GENERALLY IF THERE WAS ANYTHING FURTHER FROM ANYBODY. THIS IS A PROPER ALLOCUTION.

JONES V. STATE, 55 SO. 2D 333 (ALA. CRIM. APP. 1989).

AND BY REVIEWING ALL THE EVIDENCE AT THIS JURY TRIAL HE KNEW THAT THE CO-DEFENDANT WAS NOT CORROBORATED THIS CONSTITUTES THE FOLLOWING AUTHORITY ALTHOUGH JURY'S DECISION CONCERNING SENTENCE IS TO BE GIVEN CONSIDERATION BY THE TRIAL JUDGE, HE MAY ACCEPT OR REJECT THAT VERDICT.

HOOKE V. STATE, 534 SO. 2D 329 (ALA. CRIM. APP. 1987).

(13A-5-47)

(C.) BEFORE IMPOSING SENTENCE THE TRIAL COURT SHALL PERMIT THE PARTIES TO PRESENT ARGUMENTS CONCERNING THE EXISTENCE OF AGGRAVATING AND MITIGATING CIRCUMSTANCES AND THE PROPER SENTENCE IMPOSED IN THE CASE.

IT IS APPARENT THAT THE JURY'S VERDICT IS CLEARLY DIVERGENT FROM THE EVIDENCE AND THE LAW AND AGAINST THE GREAT WEIGHT AND PREPONDERANCE OF THE EVIDENCE.

IV. ILLEGAL SEARCH AND SEIZURE OF VEHICLE

FOURTH AMENDMENT: THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS AGAINST UNREASONABLE SEARCHES AND SEIZURES SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL ISSUE, BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED AND THE PERSONS OR THINGS TO BE SEIZED.

ON MARCH 19, 2002 OFFICER ROBBIE BETTES OF THE LANETT POLICE DEPARTMENT STOP MY MUSTANG IN A CEMETARY ABOUT 200 YARDS FROM THE ALLEGED RESIDENCE ON WHICH HE PROCLAIMED THAT THE PASSENGER OF MY VEHICLE BILLY NORRIS WAS SEEN HOLDING A GUN LOOKING THROUGH A WINDOW. SO DID SEVERAL MORE OFFICERS STATE THE SAME ALLEGATION. THAT IS THE REASON THEY SEARCHED MY AUTO MOBILE. THEY SEARCHED EVERY PORTION OF THIS VEHICLE WHICH INCLUDES: THE ARMREST, GLOVE COMPARTMENT, UP UNDER ALL SEATS, INSIDE OF THE 2 DOORS, ALL OF THE TRUNK AREA, INSIDE FACTORY RIMS AND TIRES, THE ENGINE, AND FINALLY BEHIND THE BACK PASSENGER SEATS. ON NOVEMBER 13TH AND 14TH I WENT TO JURY TRIAL ON WHICH ALL THREE WITNESSES DISCLOSED THAT NEITHER ONE OF THEM SAW A GUN OR SAID ANYTHING ABOUT ANYONE HAD A GUN. I CONTEND THAT THESE OFFICERS MADE A FALSE ALLEGATION TO SEARCH MY AUTO MOBILE. THIS IS WHAT THEY USED AS AUTHORIZATION TO OVERRIDE ANY CONSENT THAT I HAD TO SEARCH THIS CAR.

IF MY MEMORY SERVES ME RIGHT THIS ILLEGAL SEARCH LAST AT LEAST AN HOUR OR SOON WHICH I HAD STATED QUOTE UNQUOTE [HOW MANY TIMES ARE YOU GOING TO SEARCH MY CAR.] THIS WHEN AN OFFICER KNEELED DOWN BESIDE BILLY NORRIS AND STARTED TALKING THEN AFTER ABOUT 20 OR 30 MINUTES THE OFFICER STOOD UP AND TOLD DT. RICHARD CARTER SOMETHING. THEN THE OFFICER PICKED BILLY NORRIS UP OFF THE GROUND AND WALKED HIM TO A PATROL CAR AND PLACED HIM IN THE BACKSEAT. THEN AN POLICE OFFICER PICKED ME UP AND THEY ASKED ME IF I WAS SURE THAT NO GUNS WERE IN MY VEHICLE I TOLD THEM QUOTE UNQUOTE [I DO NOT HAVE ANY GUNS IN MY CAR AND THEIR BETTER NOT BE ANY GUNS IN MY CAR.] THATS WHEN A OFFICER WALKED ME TO THE SAME CAR WITH THE SKI MASK IN MY BACK POCKET AND PLACED ME IN THE SAME PATROL CAR IN THE BACKSEAT BESIDE BILLY NORRIS. THIS CAR WAS SOME DISTANCE FROM MY MUSTANG ON WHICH AFTER THEY PLACED ME IN THE PATROL CAR AS WHEN THEY SAID THAT THEY FOUND THE WEAPONS. I STAND TO CHALLENGE THIS ISSUE IN THIS HABEAS CORPUS BECAUSE POSSESSION OF A SKI MASK ONLY CREATES SUSPICION

MERE SUSPICION ALONE IS NOT SUFFICIENT BASIS FOR FINDING OF "PROBABLE CAUSE."

IVEY V. STATE 709 So. 2d 502 ALA CRIM. APP. 1997.)

IN DETERMINING WHETHER THERE IS PROBABLE CAUSE TO SEARCH, FACT THAT CONTRABAND WAS ULTIMATELY DISCOVERED CANNOT BE CONSIDERED TO SUPPLY PROBABLE CAUSE. SHIPMAN V. STATE, 291 ALA 484, 282 So. 2d 700

THIS IS MERITORIOUS TO ESTABLISH THE FACT THAT I DID HAVE AN LEGITIMATE EXPECTATION OF PRIVACY IN THE AREA SEARCHED.

FACT THAT POLICE OFFICER, WHILE MOVING SUSPECTS VEHICLE FROM AREA WHERE IT WAS ILLEGALLY PARKED, OBSERVED PISTOL IN FLOOR BOARD OF VEHICLE DID NOT PROVIDE OFFICER WITH PROBABLE CAUSE TO SEARCH VEHICLE, EVEN THOUGH SUSPECT HAD PRIOR FELONY CONVICTIONS FOR SELLING CONTROLLED SUBSTANCE AND PERSONS CONVICTED OF CERTAIN VIOLENT CRIMES WERE PROHIBITED BY STATUTE FROM POSSESSING PISTOL; SUSPECTS CONVICTION WAS NOT CRIME OF VIOLENCE, AND HIS POSSESSION OF PISTOL WAS THEREFORE NOT ILLEGAL. BEASLEY, LYKES JR. V. STATE

709 So.2d 1335 (ALA. CRIM. APP. 1997.)

I HAD ONE PRIOR FELONY BEFORE THEY CONDUCTED THIS ILLEGAL SEARCH AND SEIZURE TO WIT:

1993 RECEIVING STOLEN PROPERTY 2ND DEGREE CLASS FELONY!

V. CONFLICTED TESTIMONY OF STATE WITNESS'S

SEE PAGES 5, 6, AND 7 OF BRIEFS

VI. PRIVILEGE AGAINST SELF-INCRIMINATION

FIFTH AMENDMENT. SPECIFICALLY STATES THAT NO DEFENDANT SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF.

I TESTIFIED AT THIS TRIAL THAT I WAS NEAR THE GRAGGS PROPERTY AND ONLY ENTERED THEIR LAND TO STOP THE CO-DEFENDANT BILLY MORRIS FROM COMMITTING ANY CRIME DUE TO THE PRESENCE OF MRS. PEARL TRAMMELL AND THAT IS THE REASON THAT NO CRIME WAS COMMITTED.

NEITHER ONE OF US DID NOT ATTEMPT TO BURGLARIZE THIS RESIDENCE AT ANY TIME ON MARCH 19, 2002. I ALSO TESTIFIED TO THE TRUTH THAT I ONLY WAS THERE TO OBSERVE BILLY NORRIS COMMIT A SIMPLE CRIMINAL ACT FOR VERIFICATION TO STREET MEMBERS ON WHICH HE WANTED TO JOIN.

BUT WHEN HE TOLD ME THAT SOMEONE WAS PRESENT IN THE HOUSE I CALLED IT OFF. ON WHICH THE LAW IS WELL SETTLED THAT THIS CONSTITUTES ABANDONMENT FROM ALL EFFORTS. [13A-4-2]

ANOTHER TACK IS AS LONG AS DEFENDANTS ACTS ARE EQUIVOCAL IT CANNOT BE SAID THAT HE HAS AN INTENT TO COMMIT A CRIME, AS LONG AS THIS QUALITY OF EQUIVOCATION REMAINS THERE IS NO ATTEMPT. [13A-4-2]

MERE PRESENCE OF AN INDIVIDUAL AT THE TIME AND PLACE OF A CRIME DOES NOT MAKE HIM A PARTY TO THAT CRIME

EX PARTE G.G., 601 So. 2D 890 (ALA. 1992)

WHERE IT WAS APPARENT THAT THE STATE PROVED APPELLANT WAS PRESENT AT THE SCENE, BUT FAILED TO PROVE THAT APPELLANT WAS THERE TO ASSIST ANYONE PRESENT TO COMMIT A BURGLARY, WHILE AIDING AND ABETTING WAS AN ISSUE FOR THE JURY TO DECIDE, THERE WAS NOT ENOUGH EVIDENCE PRESENTED BY THE STATE IN THE CASE FOR THE MATTER TO GO TO THE JURY, AND APPELLANT'S MOTION TO EXCLUDE SHOULD HAVE BEEN GRANTED

PRANTZ V. STATE, 462 So. 2D 781 (ALA. CRIM. APP. 1984)

REMOTE PREPARATORY ACTS REASONABLY IN A
CHAIN OF CAUSATION DO NOT CONSTITUTE AN ATTEMPT.
HUGGINS V. STATE, 41 ALA. APP. 548, 142 SO.2D 915 CERT.
273 ALA. 708, 145 SO.2D 918 (1962.) DENIED

SOME AUTHORITIES HELD THAT WHERE THERE WAS
INSUFFICIENT OR UNSUITABLE MEANS EMPLOYED
BY THE DEFENDANT SO THAT THE INTENDED
CRIME COULD NOT BE WHOLLY COMPLETED, OR,
OTHERWISE THERE WAS IMPOSSIBILITY OF
ACHIEVEMENT, THERE CAN BE NO LIABILITY
FOR AN ATTEMPT TO COMMIT SUCH CRIME.

WHERE THERE WAS NO EVIDENCE OF DEFENDANT'S
FAILURE TO CONSUMMATE THE CRIME OF BURGLARY
IN THE THIRD DEGREE, WHICH WAS A NECESSARY
ELEMENT OF ATTEMPT, THE CHARGE OF ATTEMPT
WAS NOT NECESSARY OR PROPER.

HOLLINS V. STATE, 415 SO.2D 1249 (ALA. CRIM. APP. 1982)

COURT HELD THAT MERE PRESENCE AT THE SCENE
WAS INSUFFICIENT TO PROVE APPELLANT'S
GUILT UNDER A THEORY OF COMPLICITY

JONES V. STATE, 481 SO.2D 1183 (ALA. CRIM. APP. 1985.)

IN ORDER THAT THERE MAY BE AN ATTEMPT TO
COMMIT A CRIME WHETHER STATUTORY OR
COMMON LAW, THERE MUST BE SOME OVERT ACT
IN PART EXECUTION OF THE INTENT TO COMMIT
THE CRIME, BUT WHICH FALLS SHORT OF THE COMPLETED
CRIME; THE DIFFERENCE BETWEEN ATTEMPT AND
COMMISSION BEING THAT THE ACTOR STOP
FAILS TO PRODUCE THE RESULT INTENDED

BROADHEAD V. STATE, 24 ALA. APP. 576, 139 SO. 115 (1932.)

SINCE THE EVIDENCE CREATED MERELY A
 SUSPICION OF GUILT, IT WAS WHOLLY INSUFFICIENT
 TO SUPPORT A CONVICTION. RUFFIN V. STATE,
 513 So. 2D. 63 (CALA. CRIM. APP. 1987)
 AN ATTEMPT NECESSARILY LIES SOMEWHERE
 BETWEEN MERE INTENT, WHICH ALONE IS NOT
 PUNISHABLE AND THE COMPLETED OFFENSE
 [13A-4-2]

"COURTS FAILURE TO GIVE THE CHARGES ON THE
 LESSER INCLUDED OFFENSES" THE TRIAL COURT
 COMMITTED ERROR PREJUDICIAL TO DEFENDANT
 IN NOT INSTRUCTING THE JURY AS TO THE
 LESSER INCLUDED OFFENSES. MATKENS V. STATE
 497 So. 2D. 194 (CALA. CRIM. APP. 1985.) AFF'D.

INSTRUCTION THAT DEFENDANTS WERE PRESENT
 AT CRIME SCENE WAS NOT COMPLICITY ADEQUATELY
 COVERED THE DEFENDANTS REQUESTED CHARGE
 THAT MERE KNOWLEDGE OF THE CRIME WAS NOT
 SUFFICIENT TO SHOW COMPLICITY
 MANZGON V. STATE, 740 So. 2D. 444

THE APPELLANT ARGUES, INTER ALIA, THAT THIS
 CAUSE SHOULD BE REMANDED TO THE CIRCUIT COURT
 FOR AN EVIDENTIARY HEARING ON HIS
 CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL
 THE STATE AGREES. DILL V. STATE 717 So. 2D. 206
 (CALA. CRIM. APP. 1994.)

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

I STAND TO VERIFY THAT MY TRIAL COUNSEL WAS INEFFECTIVE AT TRIAL AND ON APPEAL. FIRST OF ALL SHE ALLOWED THE STATE TO INTRODUCE FALSE EVIDENCE TO WIT: A SKI MASK ON WHICH I HAD TOLD HER THAT THE LANETT POLICE OFFICERS DID NOT TAKE THE SKI-MASK FROM ME AND THE VIDEO TAPE WOULD SHOW THIS. SHE PROCLAIMED THAT SHE DID NOT WANT THE JURY TO SEE THE GUNS IN MY MUSTANG AND TO FIND OUT THAT THEY WERE STOLEN IN ANOTHER BURGLARY. TO MY RECOLLECTION THE MOTION OF LEMINE ACCURATELY COVERED THIS AREA OF CONCERN THEREFORE WE HAD A HEATED DEBATE ON THIS ISSUE ON WHICH SHE REFUSED MY REQUEST AND OPPOSED IT EVERY TIME THAT I BROUGHT IT UP. THE ARGUMENT WENT ON FOR A COUPLE OF HOURS OF SHE AND I DEBATING ON WHICH WAS MORE IMPORTANT REVEALING THE ADMISSION OF FALSE EVIDENCE OR HIDING THE SPECIFIC PLACE WHERE TWO GUNS CAME FROM. THIS ALONE SHOWS THAT THIS COUNSEL KYLA HELM GROSS WAS DEFICIENT AND SUCH PERFORMANCE PREJUDICED MY DEFENSIVE STANCE AT TRIAL.

SHE ALSO LOST MY APPEAL.

IN CASES IN WHICH TRIAL COUNSEL ALSO SERVED AS APPELLATE COUNSEL ARE COGNIZABLE TO A PETITION UNDER THIS RULE.

GRAYSON V. STATE 675 So.2D 516 (ALA. CRIM. AP. 1995)
BEDWELL V. STATE 710 So.2D 493 (1997)

SHE ALSO WAS INEFFECTIVE AT OTHER PHASES OF THIS TRIAL. I REQUESTED HER TO OBJECT TO THE CO-DEFENDANT'S ADMISSION OF HIS GUILTY PLEA AS HE TESTIFIED THAT HE ACCEPTED THE TIME THAT HE WAS GIVEN WITH NO PROBLEM. AND ASKED HER TO CROSS-EXAMINE BY ADMITTING HIS WITHDRAWAL OF GUILTY PLEA AS A SOLID DEFENSE SHE ALSO OPPOSED ME ON THAT. ADMISSION OF A CO-DEFENDANT'S GUILTY PLEA WILL SUBSTANTIALLY AFFECT THE DEFENDANT'S RIGHT TO A FAIR TRIAL IN THAT THE JURY MAY REGARD THE ISSUE OF THE REMAINING DEFENDANT'S GUILT AS SETTLED AND THAT THE TRIAL IS A MERE FORMALITY THEREFORE REVERSIBLE ERROR WAS COMMITTED WHERE THE STATE ASKED A WITNESS WHETHER A CO-DEFENDANT WAS ON DEATH ROW AND THE COURT FAILED TO GIVE A SUFFICIENT LIMITING INSTRUCTION TO MLIV. STATE 591 So. 2D 550 CALA. CRIM. APP. 1991 I ALSO ASKED HER TO OBJECT TO THE DISTRICT ATTORNEY BILL LIENBY CLOSING ARGUMENT ON WHICH HE STATED FORCEFULLY THAT HE BELIEVED THE CO-DEFENDANT TESTIMONY. SHE ONCE AGAIN OPPOSED ME AND I BELIEVE THAT FOR HER TO STATE SUCH WORDS, HAD A POWERFUL IMPACT ON THE JURY ON WHICH PREJUDICED ME AT THE END OF THIS TRIAL. THIS WAS PART OF HER DEFICIENT PERFORMANCE.

REMARKS OF THE PROSECUTOR, VOUCHING FOR THE CREDIBILITY OF THE STATE'S WITNESS, HELD CLEARLY ERRONEOUS WHERE HE STATED, IN THE STRONGEST LANGUAGE, HIS PERSONAL BELIEF IN THE WITNESS CREDIBILITY. COMMENTS OF THE PROSECUTOR, TAKEN AS A WHOLE, COULD REASONABLY HAVE LED THE JURY TO BELIEVE THAT THE PROSECUTOR POSSESSED ADDITIONAL REASONS FOR KNOWING THAT THE STATE'S WITNESS TESTIFIED TRUTHFULLY, REASONS NOT KNOWN TO THE JURY. GUTHER V. STATE
616 So. 2D 914

WHERE DEFENDANT IS REPRESENTED AT TRIAL AND ON APPEAL BY SAME COUNSEL, CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL ARE COGNIZABLE IN PETITION FOR POST-CONVICTION RELIEF.

PROPERLY RAISED. EX PARTE BESSEHAAR
600 So. 2D 978, 979 (ALA. 1992.)

MERITORIOUS ALLEGATIONS WARRANT EITHER AN EVIDENTIARY HEARING OR AN ADEQUATE EXPLANATION FOR THEIR DENIAL. BENEFZLOV, STATE,
583 So. 2D 1370
(ALA. CRIM. APP. 1991.)

VIII. THE VALUE OF A WAIVER OF RIGHTS FORM.

I CHRISTOPHER McCULLOUGH STAND TO CHALLENGE THE CRITERIA FOR SIGNING SUCH FORM TO THE DEGREE OF PROPER PROSPECTIVENESS OF ENLIGHTENED MEANING TO WIT: IF YOU ALLOW YOURSELF TO BE QUESTIONED BY DETECTIVES DOES NOT MEAN THAT YOU AUTOMATICALLY MADE A STATEMENT. THIS BELIEF IS IN TOTAL CONFLICT WITH WHICH THE FORM STATES YOU APPROVE OF THEM TO QUESTION YOU AND KNOWING THAT YOUR RIGHTS SPECIFICALLY STATE THAT YOU CAN STOP ANSWERING QUESTIONS OR STOP THIS INTERROGATION AT ANY GIVEN TIME. THIS IS THE PROPER TECHNIQUE OF AN DEFENDANT WHO WAIVES SUCH RIGHTS AND IN LIGHT AN UNSIGNED STATEMENT SUBMITTED BY A DETECTIVE IS CONTRADICTORY TO THESE STANDARDS. THEY PROCLAIMED THAT THE STATEMENT WAS TRUE AND CORRECT BUT I DID NOT SIGN OR ENDORSE OR VERIFY TO SUCH ALLEGATIONS ON WHICH I FORCEFULLY STAND TO CHALLENGE THIS ACT THAT CORPUS DELICTI HAS NOT BEEN ESTABLISHED.

VALID WAIVER OF MIRANDA RIGHTS CANNOT BE ESTABLISHED BY SHOWING MERELY THAT THE ACCUSED RESPONDED TO POLICE-INITIATED INTERROGATION EVEN AFTER BEING ADVISED OF HIS OR HER RIGHTS. WEAVER U.S. STATE 710 S. 20480

MEMORANDA PREPARED BY THE INVESTIGATING
OFFICER ARE NOT ACTUALLY STATEMENTS AS
DEFINED IN EX PARTE PATE AND ARE
SPECIFICALLY EXCLUDED FROM DISCOVERY.
GIBSON V. STATE, 555 SO.2D 784 (ALA. CRIM. APP. 1989.)

CONCLUSION

I THE DEFENDANT IN THIS CASE
 DID HEREBY BRING PROPER CHALLENGE
 TO THIS CHARGE BY POST CONVICTION RULE 32
 ON WHICH WAS DENIED SOME 18 MONTHS
 AFTER FILING. NO EVIDENTIARY HEARING
 WAS HELD TO DETERMINE THE ISSUES
 ON THE FACE OF THIS PETITION ON
 WHICH WERE MERITORIOUS AND WOULD
 HAVE GRANTED PETITIONER RELIEF.
 THE TRIAL COURT COMMITTED
 REVERSIBLE ERROR THROUGHOUT THIS
 WHOLE SERIES OF EVENTS
 THE VERDICT WAS CONTRARY TO LAW,
 THE TRIAL JUDGE VIOLATED HIS DISCRETION
 AT TRIAL AND SENTENCING, STATE
 ADMITTED FALSE EVIDENCE ON WHICH
 THIS GROUND ALONE CONSTITUTE
 AUTOMATIC ACQUITTAL ON WHICH
 THIS IS THE MOST DISPUTATIVE ISSUE
 IN THIS PETITION THEREFORE
 AN EVIDENTIARY HEARING WAS
 APPROPRIATE IN THIS MATTER.
 THE COURT OF CRIMINAL APPEALS
 STATES THAT I GAVE SELF-INCRIMINATING
 TESTIMONY AT TRIAL.
 THEREFORE IN THIS WRIT OF HABEAS
 I SEEK FULL RELIEF OF CORPUS
 IMMEDIATE ACQUITTAL OF THE SAID
 CHARGE.

ORAL ARGUMENT IS REQUESTED

PAGE 22.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE
THIS DATE SERVED AN EXACT SAME
COPY OF THE FOREGOING BRIEF AND
ARGUMENT TO THE CLERK OF THE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT
P.O. BOX 711
MONTGOMERY, ALABAMA 36101-0711
POSTAGE PREPAID ON THIS THE 28TH DAY
OF DECEMBER 2006.

PURSUANT TO RULE 34(CA):
I HAVE DEMANDED ORAL ARGUMENT
AND HAVE SO INDICATED ON THE
COVER OF MY BRIEF.

SIGNATURE Christopher C.
McCullough
CHRISTOPHER C.
MCCULLOUGH
PRO'SE